

STATE OF MICHIGAN
COURT OF APPEALS

KENT R. CHURCHES, JACQUELINE SUE
CHURCHES and RICHARD L. CHURCHES,

UNPUBLISHED
May 18, 2006

Plaintiffs-Appellees,

v

ROBERT H. RUTTMAN, LYDIA M.
RUTTMAN, GERALD R. SMITH, and DEANNE
V. SMITH,

No. 259162
Montmorency Circuit Court
LC No. 02-000042-CH

Defendants-Appellants.

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition to plaintiffs, holding that defendants could not demonstrate that their use of an easement beyond its express terms was hostile, so they could not establish a right to that additional use by prescription. We affirm.

In 1955, Roy and Evelyn Churches, now deceased, acquired title to three adjacent parcels of land, one of which had direct access to West Twin Lake. They sold the two parcels without direct lake access to defendants' predecessors in title, one lot to Donald and Kathleen Fournier, the other to Erwin and Shirley Schmidt. Both deeds contained language explicitly granting an express "easement for ingress and egress" to the lake over the remaining lot. The deeds did not mention any other rights. The lakefront lot eventually passed to plaintiffs, and the other lots eventually passed to defendants. The lots were generally used by all parties as vacation, weekend, and holiday property. Various different docks were constructed at the end of the easement over the years, and boats were sometimes stored on the easement. In 1992 or 1993, the Ruttmans began expanding the use of the easement by mooring boats and expanding the dock.

In 2000 and 2001, Kent Churches concluded that the easement did not include a dock or boat storage, and he attempted to negotiate with the Ruttmans, seeking compensation for their additional use of the easement. When the negotiations failed, plaintiffs filed this lawsuit, seeking to prevent defendants from using the easement for anything beyond ingress and egress to the lake. The trial court concluded that the dock and boat storage were both apparently by permission at first, and defendants failed to provide evidence to refute that. Therefore, the trial

court found the additional uses of the easement permissive, precluding defendants from establishing a prescriptive easement for those additional uses. Defendants now appeal.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). However, we are “limited to the evidence that had been presented to the trial court at the time the motion was decided.” *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden, supra* at 120. “A mere promise” by the nonmoving party to establish a genuine issue of fact at trial “is insufficient under our court rules.” *Id.*, 121. If the nonmoving party would have the burden of proof at trial, the nonmoving party must “go beyond the pleadings” and “present documentary evidence establishing the existence of a material factual dispute.” *Quinto v Cross and Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

The scope of an express easement is determined by its plain language, which is enforced as written with no further inquiry if it is unambiguous. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). The easements in this case unambiguously grant only ingress and egress to the lake. They do not include any riparian rights such as the right to maintain a dock or moor or store a boat, so the grant is limited to such activities as swimming, fishing, or temporarily anchoring a boat. *Dyball v Lennox*, 260 Mich App 698, 708; 680 NW2d 522 (2004). A prescriptive easement can be established where an express easement failed through some defect and was treated as if it had been properly established. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 684; 619 NW2d 725 (2000). However, there is no defect here. The easement is unambiguous, so our inquiry stops there. *Little, supra* at 700.

However, a prescriptive easement can arise in a similar manner to adverse possession, where there is “use of another’s property that is open, notorious, adverse, and continuous for a period of fifteen years.” *Higgins Lake Prop Owners Ass’n v Gerrish Twp*, 255 Mich App 83, 118; 622 NW2d 387 (2003). All elements other than adversity have been met here. The parties only seriously dispute whether defendants’ additional use of the property was permissive. Adverse or hostile use cannot be established where the use is permissive, regardless of the length of the use. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995). If this open, notorious use of the easement for a dock and boat storage was with the permission of the Churches, then there is no adverse or hostile use and there is no prescriptive easement.

Defendants, as the party claiming a prescriptive easement, have the burden of proof as to that claim. *Plymouth Canton Community Crier, Inc, supra* at 679. The lack of permission in the original easement to use a dock or to store boats is only evidence that the Churches did not wish to be bound by an express grant. Several parties testified that they believed, although they were uncertain, that the additional uses of the easement were with the Churches’ permission. All parties were actually aware of the additional use of the easement, with no protest. Although the evidence of permission is circumstantial and weak, there is *no* evidence tending to show a lack of permission. Because the original grantors are deceased, there can be no more evidence on the

matter forthcoming. Therefore, viewing the evidence in the light most favorable to defendants, defendants fail to show that their claim could be supported by evidence produced at trial.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis